at home with elderly people and there is no children of their own age group in that household. This is one other factor which has influenced us considerably. The father cannot constantly be present to care for the children and to provide for them. The father can therefore offer, at best, life with himself and his parents, brother and sisters. We are therefore uncertain what will be the relationship which will develop between the children and their elderly relations.

As to continuity, the present situation does not, in any way, encourage us to believe that its continuation can do anything to operate against the welfare of the children.

We are also aware of the damage done to emotional development of children if they are suddenly removed from a known, secure, supporting set of relationships, and thrust among strangers, even if they be some blood relationship with one or more of the strangers. In some cases this may be explored by calling expert evidence; in others, the ordinary experience of the courts is relied upon. But this does not mean that the *status quo* must always be preserved. It merely means that we must anxiously consider the evidence placed before the court and determine how best to promote the interests and welfare of the children. After having done that we are of the opinion that it cannot be but for the children's interests and welfare that they be returned to their mother.

For a judgment of this kind to be reversed by this court, matters must be shown of the kind to which reference has been made in many cases, such as *Teh Eng Kim* v. *Yew Peng Siong.*[3] We are by no means satisfied that the learned judge, in the circumstances of this particular case, was wrong in the sense to which those principles refer, or that he was in default in relation to the kind of considerations referred to in such cases.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Zain & Co.; Skrine & Co.*

KU LIP SEE v. PUBLIC PROSECUTOR

[F.C. (Wan Suleiman Ag. C.J., Syed Othman & Abdul Hamid F.JJ.) September 7 & December 2, 1981]
[Johor Bahru — Federal Court Criminal Reference No. 3 of 1981]

Criminal Law and Procedure — Appeal from subordinate Court heard by High Court — Application for reference of question of law to Federal Court — Evidence in support of alibi — Question not within scope of s. 66(1) of Courts of Judicature Act, 1964 — Criminal Procedure Code (F.M.S. Cap. 6), s. 402A.

The applicant had been charged with rape. At the end of the prosecution case the learned President found that the prosecution had established a *prima facie* case and he called on the applicant to enter on his defence. The defence of the applicant was an outright denial. The learned President acquitted the applicant as he stated he was left in a real state of doubt as to the case for the prosecution and the applicant's guilt. The Public Prosecutor appealed. Yusof Abdul Rashid J. allowed the appeal and held that in the circumstances the order of acquittal must be reversed. — See [1981] 1 M.L.J. 258. The applicant thereupon applied for the following two questions to be reserved for the decision of the Federal Court —

"(1) whether in an offence where the prosecution cannot specifically particularise the time and place when the offence was committed, evidence put forward by the defence to the effect that the accused was unlikely to have been present amounts to the defence of or evidence in support of alibi.

(2) If the answer to the above is in the affirmative then whether in an offence where the prosecution cannot specifically particularise the time and place when the offence was committed, the defence is precluded from adducing evidence tending to show that accused was unlikely to have been present when the crime was committed by reason of his failure to give the required notice under section 402A of the Criminal Procedure Code."

Held: (1) although the charge in this case had not stated when the offence was committed during the months of May and June 1978 it had nevertheless specifically defined the time and place sufficiently to enable the applicant to answer the charge. The applicant did not put forward any alibi defence, but his defence was in effect a complete denial of the prosecution case. The appellate judge quite rightly treated it as purely a question of fact;

(2) the first question posed in this case therefore was not a question of law within the scope of section 66(1) of the Courts of Judicature Act, 1964. No question of law arose in the course of the appeal and there could not be any question of law that has affected the event of the appeal;

(3) the second question was dependent on the determination of the first question and therefore did not arise.

Semble: If a trial court having considered the evidence put forward by the defence holds that such evidence amounts to evidence in support of an alibi for which no notice under section 402A of the Criminal Procedure Code has been given, then the court has no discretion in the matter but to exclude such evidence.

Case referred to:-

(1) *Public Prosecutor* v. *Lim Chen Len* [1981] 2 M.L.J. 41.

FEDERAL COURT.

Teh Poh Teik for the applicant.

John O'Hara (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): This reference under section 66(1) of the Courts of Judicature Act 1964 (Act 91) reserves the following two questions for the decision of the Federal Court:

"(1) whether in an offence where the prosecution cannot specifically particularise the time and place when the offence was committed, evidence put forward by the defence to the effect that the accused was unlikely to have been present amounts to the defence of or evidence in support of alibi.

(2) If the answer to the above is in the affirmative then whether in an offence where the prosecution cannot specifically particularise the time and place when the offence was committed, the defence is precluded from adducing evidence tending to show that accused was unlikely to have been present when the crime was committed by reason of his failure to give the required notice under section 402A of the Criminal Procedure Code."

First the facts:

The applicant Ku Lip See aged 36 was charged in the Sessions Court Johore Bahru for an offence under section 376 of the Penal Code. It was alleged

that between the month of May 1978 at about 7.00 p.m. and the month of June 1978 at about 7.00 p.m. at Kampong Ulu Pandan, Plentong, in the District of Johore Bahru, in the State of Johore, he raped one Liew Yoon Lee (f).

It was established that Liew was at the material time under the age of 14 years (12 years 10 months to be exact) and the applicant was capable of sexual intercourse. The learned President Sessions Court fully accepted the testimony of Liew after warning himself of the danger of accepting her evidence as to the identity of the person who raped her without corroboration. However having heard the defence the President stated that he was left in a real state of doubt as to the prosecution case and of the guilt of the applicant. He was not fully convinced of the applicant's story nevertheless it raised a reasonable doubt in his mind. He acquitted and discharged the applicant.

The following passage from the President's judgment reveals the whole basis he founded his decision:

"After considering the whole of the evidence before me, the prosecution and the defence, I was left in reasonable doubt that he was the person who raped PW2 if at all PW2 was raped. Now PW2 did not name the accused when she was first asked by her mother PW1 as to whether she had any sexual relations. It was more than a week later and only after PW1 had threatened her that she named the accused as the person who had raped her."

The applicant testified that he was a construction worker at the material time staying at Pandan with a friend Lee Kit (DW2) whose house was two doors away from Liew's house. He knew her and had spoken to her. He also testified that he finished work between "5 and 6 p.m.". He denied going to the riverside or that he committed the offence.

Lee Kit, called as defence witness, testified that he and the applicant had dinner around 6 to 7 p.m. and the applicant usually went out around 8 p.m.

The Public Prosecutor appealed against the whole of the decision of the learned President. The appellate Judge Yusof Abdul Rashid held that there was no basis at all to found any reasonable doubt on the case for the prosecution. The learned President himself made positive findings of fact to establish that the girl was raped corroborated by medical evidence and he accepted and believed the girl's evidence that the applicant was the person who had sexual intercourse with her. The learned judge referred to that passage in the learned President's judgment where he said —

"With regard to the second ingredient that the accused raped her, there was no corroboration of her evidence. Nevertheless after closely scrutinising her evidence I accepted her evidence that it was the accused who had raped her. The accused was no stranger to her as she had seen him for some time in the village."

The learned judge went on to say that he found it difficult to understand how the President could entertain doubt on the prosecution case merely on the strength of the applicant's denial and his observation of the demeanour of the applicant after making specific findings of fact at the close of the prosecution case that the applicant had raped the girl. The learned judge observed that if DW2's evidence was intended to provide alibi then it was inadmissible for non-compliance with section 402A of the Criminal Procedure Code. In any event DW2's testimony did nothing to substantiate the applicant's contention that he (applicant) did not see the girl on these two occasions as alleged by the prosecution during May and June 1978.

From the judgment of the appellate judge it is revealed there was a submission by counsel for the applicant to the effect that the evidence relating to alibi was not intended to establish alibi in favour of the applicant, but to discredit the veracity of the testimony of the girl.

The first question is reserved for us to determine whether defence evidence to the effect that the applicant was unlikely to have been present amounts to a defence or evidence in support of alibi in cases where the prosecution cannot specifically particularise the time and place.

The law is clear in that a reference under section 66 of the Courts of Judicature Act must relate to a question of law and not to a question of fact. It must be a question of law of public interest and must have arisen in the course of the appeal. Furthermore the determination of such question in the course of the appeal must have affected the event of the appeal. The question is — was there a question of law for the judge to determine in the course of the appeal such as is posed before us. The questions reserved must accordingly be examined in the light of the decision of the judge to decide whether such question arose in the course of the appeal. We must be satisfied that such question is of public interest and that the determination by the judge of that question has affected the event of the appeal.

The first question before us is so framed that it embodies an assumption that the prosecution did not provide specific particulars of the time and place the offence was committed. We hardly think so. In the charge it is specified that the offence was committed on both occasions at about 7 p.m. and the place at this village where the applicant was residing during the relevant period.

In the appellate court the decision of the President was reversed solely on the ground that there was more than ample evidence to substantiate the finding of facts arrived at by the President. In essence the appellate judge overturned the President's decision for reason that the decision was grossly against the weight of evidence. This is abundantly clear from the grounds of judgment of the appellate judge. His decision was arrived at after making an evaluation of the evidence of the defence which was not alibi defence. No evidence either in the nature of or involving alibi defence was given by the applicant. The only defence evidence which could be regarded as supporting alibi defence was given by DW2 when he said that the applicant usually went out around 8 p.m. If such evidence was in support of alibi defence then it was clearly inadmissible for non-compliance with section 402A of the Criminal Procedure Code.

We have noted what Azmi J. said in *Public Prosecutor* v. *Lim Chen Len*[1] concerning the admissibility of evidence in support of defence of alibi and we are of the view that he decided correctly. If a trial court having considered the evidence put forward by the defence holds that such evidence amounts to evidence in support of an alibi for which no notice under section 402A Criminal Procedure Code has been given, then he has no discretion in the matter but to exclude such evidence. In this respect we agree that a distinction can be drawn between the provisions in our Criminal Procedure Code and section 11(1) of the English Criminal Justice Act 1967. It is nonetheless significant to note that section 11(8) of the Criminal Justice Act defines "evidence in support of an alibi" to mean "evidence tending to show that by reason of the presence of the defendant at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission," whereas our section 402A does not so define but merely provides that "where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support thereof". The meaning of tne words "evidence in support thereof" under section 402A(1) cannot, in our view, be said to differ from that assigned by section 11(8) of the English Act.

A determination whether particular evidence is evidence in support of alibi entails a consideration whether the evidence shows or tends to show that by reason of the presence of the accused at some particular place or area at a particular time he cannot be or is unlikely to be at the place where the offence is committed. It is difficult if not impossible to envisage with reference to a particular charge what evidence amounts or does not amount to evidence in support of a defence of alibi. It depends very much on the facts of each particular case. It has been described that "What is ordinarily meant by an alibi is that the accused's presence elsewhere is essentially inconsistent with his presence at the time and place alleged, and therefore with participation in the crime. An alibi may absolutely preclude the possibility of presence at the alleged time and place of the act; or the alibi may not involve absolute impossibility, but only high improbability and yet be convincing." (see *Criminal Law Review* 1978 pp. 277-8 and also on p. 278 where it is further stated that "a true alibi defence consists of a affirmative proof of the defendant's presence somewhere other than at the time and place alleged.").

With reference to question (1), we are constrained to observe that although the charge has not stated exactly when the offence was committed during the months of May and June 1978 it has nevertheless specifically defined the time and place sufficiently to enable the applicant to answer the charge. The applicant did not put forward any alibi defence. It was in essence a complete denial of the prosecution case. The appellate judge quite rightly treated it as purely a question of fact. That being the case, we are unable to hold that the question posed is one of law within the scope of section 66(1) of the Courts of Judicature Act 1964. As for the present application, it is our considered view that no question of law arose in the course of the appeal and there cannot therefore be any question of law that has affected the event of the appeal. Question (2) is dependent upon question (1) and the determination of this question therefore does not arise.

The application is dismissed.

Application dismissed.

Solicitors: *Abdul Rahman Saad & Associates.*

PIANG HONG YON & ORS. v. SYARIKAT SERI BELIAN SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Salleh Abas F.JJ.) July 10 & December 5, 1981]

[Kuala Lumpur — Federal Court Civil Appeals Nos. 71, 140, 141, 142, 143 & 144 of 1980]

Land Law — Caveat — Subdivided lots in land sold — No transfers executed — Claim that whole of land had been transferred to respondent — Vendor denying validity of transfer — Caveats entered by purchasers of sub-lots — Application to remove caveats — Serious question of fact and law to be tried.

In this case the vendor the registered proprietor of a large piece of land had sold subdivided lots to a number of purchasers including the appellants. No memorandum of transfer had been executed. Subsequently the respondent claimed to have bought the whole of the land from the vendor and he had a memorandum of transfer of the land to him. The vendor denied the validity of the transfer. The purchasers of the sub-divided lots entered caveats on the land and so the memorandum of transfer could not be registered. The vendor and some of the purchasers of the sub-lots brought a suit against the respondent claiming that the purported transfer of the land to the respondent was null and void as it was obtained by fraud. The respondent applied to have the caveats removed and in separate actions brought by him against the appellants, Ajaib Singh J. ordered the caveats to be removed. The appellants appealed.

Held: (1) there were serious questions of fact and law which arose in this case and the learned Judge was not entitled to reach a finding that the respondent was truly the registered owner without a proper trial of the issues;

(2) in the circumstances the caveats should remain to await the outcome of the civil suit against the respondent.

FEDERAL COURT.

H.B. Ball (*R.R. Chelvarajah* with him) for all the appellants, except F.C.C.A. No. 144/1980.

Edgar Joseph for appellant in F.C.C.A. No. 144/1980.

Tara Singh Sidhu for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): These six appeals arose from two decisions of Ajaib Singh J. in which he allowed the respondent's applications to remove private caveats entered on a piece of land held under Holding No. 31 and Holding No. 41 of Malacca Town IV. The appellants, unhappy with the decisions appealed to us. For the purpose of these appeals it is convenient to set out the facts as follows.

The land-Holding No. 31 and Holding No. 41 — was owned and registered in the name of Seet Tiam